

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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In re: BAIR HUGGER FORCED AIR  
WARMING DEVICES PRODUCTS  
LIABILITY LITIGATION

MDL No. 15-2666 (JNE/DTS)

This Document Relates to:

Case Nos.:

15-cv-04044 (*Campbell v. 3M Company*)  
15-cv-04211 (*Little v. 3M Co., et al.*)  
15-cv-04244 (*Seitter v. 3M Co., et al.*)  
15-cv-04571 (*Atchetee v. 3M Co., et al.*)  
16-cv-00242 (*Dethlefsen, Jr. v. 3M Company*)  
16-cv-00271 (*Charap v. 3M Company*)  
16-cv-00360 (*McCormick v. 3M Company*)  
16-cv-00384 (*Roth v. 3M Co., et al.*)  
16-cv-00515 (*Klosinski v. 3M Company*)  
16-cv-00516 (*Simpson v. 3M Company*)  
16-cv-00517 (*Ryan v. 3M Company*)  
16-cv-00518 (*Thompson v. 3M Company*)  
16-cv-00836 (*Pease v. 3M Company*)  
16-cv-00839 (*Smith, Donald v. 3M Company*)  
16-cv-00837 (*Burleson v. 3M Company*)  
16-cv-00838 (*Plumley v. 3M Company*)  
16-cv-00545 (*Andras v. 3M Co., et al.*)  
16-cv-00546 (*Franks, II v. 3M Co., et al.*)  
16-cv-01232 (*Morris v. 3M Company*)  
16-cv-01257 (*Harvey v. 3M Company*)  
16-cv-01259 (*Lance v. 3M Company*)  
16-cv-01858 (*Stitt v. 3M Company*)  
16-cv-01895 (*Eney v. 3M Co., et al.*)  
16-cv-02000 (*McMillan v. 3M Co., et al.*)  
16-cv-02005 (*Siddens v. 3M Company*)  
16-cv-02033 (*Anaya v. 3M Co., et al.*)  
16-cv-02042 (*Asbury v. 3M Co., et al.*)  
16-cv-02048 (*Cooke, Jr. v. 3M Co., et al.*)  
16-cv-02292 (*Davis v. 3M Co., et al.*)  
16-cv-02298 (*Dandrea v. 3M Co., et al.*)  
16-cv-02299 (*Redman v. 3M Co., et al.*)  
16-cv-02338 (*Duval v. 3M Co., et al.*)  
16-cv-02500 (*Pastor v. 3M Co., et al.*)

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**MEMORANDUM OF LAW IN  
SUPPORT OF DEFENDANTS'  
MOTION FOR ENTRY OF AN  
ORDER TO SHOW CAUSE WHY  
CASES SHOULD NOT BE  
DISMISSED FOR LACK OF  
PRODUCT IDENTIFICATION OR  
PRODUCT-RELATED INJURY**

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16-cv-02503 (*West v. 3M Co., et al.*)  
16-cv-02516 (*Wilson v. 3M Co., et al.*)  
16-cv-02543 (*Mains v. 3M Co., et al.*)  
16-cv-02546 (*Walker v. 3M Co., et al.*)  
16-cv-02584 (*Butler v. 3M Co., et al.*)  
16-cv-02591 (*Hebert v. 3M Co., et al.*)  
16-cv-02593 (*Marriott v. 3M Co., et al.*)  
16-cv-02657 (*Waters v. 3M Co., et al.*)  
16-cv-02658 (*Goble v. 3M Co., et al.*)  
16-cv-02729 (*Orias v. 3M Company*)  
16-cv-02812 (*Hall v. 3M Co., et al.*)  
16-cv-02814 (*Grudzinski v. 3M Co., et al.*)  
16-cv-02951 (*O'Grady, Jr. v. 3M Co., et al.*)  
16-cv-02953 (*Morgan, Jr. v. 3M Co., et al.*)  
16-cv-02998 (*Ferrante v. 3M Co., et al.*)  
16-cv-03109 (*Hrbek v. 3M Co., et al.*)  
16-cv-03110 (*Dickens v. 3M Co., et al.*)  
16-cv-03165 (*Gallegos v. 3M Co., et al.*)  
16-cv-03317 (*Hollins v. 3M Co., et al.*)  
16-cv-03357 (*Batkins v. 3M Co., et al.*)  
16-cv-03708 (*Goodson v. 3M Co., et al.*)  
16-cv-03783 (*White v. 3M Co., et al.*)  
16-cv-03784 (*Stewart v. 3M Co., et al.*)  
16-cv-03934 (*Hougen v. 3M Co., et al.*)  
16-cv-03989 (*Malady v. 3M Company*)  
16-cv-03993 (*Johnson, Mark v. 3M Company*)  
16-cv-04053 (*Hellard v. 3M Co., et al.*)  
16-cv-04056 (*Rhodes v. 3M Co., et al.*)  
16-cv-04151 (*Leonard v. 3M Company*)  
16-cv-04169 (*McFarland v. 3M Company*)  
16-cv-04182 (*Myers, C. Thomas v. 3M  
Company*)  
16-cv-04206 (*Palmer v. 3M Company*)  
16-cv-04211 (*Miller, Terri v. 3M Company*)  
16-cv-04212 (*Scrittorale v. 3M Company*)  
16-cv-04213 (*Fisher v. 3M Company*)  
16-cv-04218 (*Polasko v. 3M Company*)  
16-cv-04223 (*Mann v. 3M Company*)  
16-cv-04283 (*Myers, Frank v. 3M Company*)  
16-cv-04391 (*Reed v. 3M Company*)  
16-cv-04410 (*Williams, Gloria v. 3M Co., et  
al.*)  
16-cv-04411 (*Thomas v. 3M Co., et al.*)

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16-cv-04414 (*Munoz v. 3M Co., et al.*)  
 16-cv-04415 (*Smith-Barbour v. 3M Co., et al.*)  
 16-cv-04416 (*Lewis v. 3M Co., et al.*)  
 16-cv-04417 (*Coleman v. 3M Co., et al.*)  
 16-cv-04420 (*Holliday v. 3M Co., et al.*)  
 16-cv-04421 (*Winfield v. 3M Co., et al.*)  
 16-cv-04422 (*McGalliard v. 3M Co., et al.*)  
 17-cv-00052 (*Marshall v. 3M Company*)  
 17-cv-00225 (*Cooper, et al. v. 3M Co., et al.*)  
 17-cv-00264 (*Williams, Millard v. 3M Company*)  
 17-cv-00321 (*McDonald v. 3M Company*)  
 17-cv-00349 (*Baxter v. 3M Co., et al.*)  
 17-cv-00434 (*Reid v. 3M Co., et al.*)  
 17-cv-00448 (*Gibson v. 3M Co., et al.*)  
 17-cv-00458 (*Adams v. 3M Company*)  
 17-cv-00584 (*Lang v. 3M Company*)  
 17-cv-00588 (*Laguna v. 3M Co., et al.*)  
 17-cv-00612 (*Christopher v. 3M Co., et al.*)  
 17-cv-00712 (*Owens v. 3M Company*)  
 17-cv-00753 (*Matthews v. 3M Company*)  
 17-cv-00999 (*Lindsey v. 3M Company*)  
 17-cv-01005 (*Taneff v. 3M Company*)  
 17-cv-01007 (*Litchfield v. 3M Company*)  
 17-cv-01012 (*Hales v. 3M Company*)  
 17-cv-01125 (*Mack, Elizabeth v. 3M Company*)  
 17-cv-01211 (*Charles Torio v. 3M Co., et al.*)  
 17-cv-01216 (*Hamed v. 3M Company*)  
 17-cv-01217 (*Lane v. 3M Company*)  
 17-cv-01221 (*Locke v. 3M Company*)  
 17-cv-01222 (*Payton v. 3M Company*)  
 17-cv-01242 (*Hightower v. 3M Company*)  
 17-cv-01249 (*Prilo v. 3M Company*)  
 17-cv-01251 (*Whitehead v. 3M Company*)  
 17-cv-01281 (*Hinthorne v. 3M Company*)  
 17-cv-01282 (*Hagaman v. 3M Company*)  
 17-cv-01284 (*Hasler v. 3M Company*)  
 17-cv-01291 (*Henson v. 3M Company*)  
 17-cv-01292 (*Luttrell v. 3M Company*)  
 17-cv-01294 (*Arrington v. 3M Company*)  
 17-cv-01306 (*McCumbers v. 3M Company*)  
 17-cv-01317 (*O'Conner v. 3M Company*)

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17-cv-01329 (*Hutson v. 3M Company*)  
17-cv-01334 (*Roszak v. 3M Company*)  
17-cv-01338 (*Padmore v. 3M Company*)  
17-cv-01341 (*High v. 3M Company*)  
17-cv-01342 (*Buczko v. 3M Company*)  
17-cv-01343 (*Sinnett v. 3M Company*)  
17-cv-01345 (*Pickelsimer v. 3M Company*)  
17-cv-01346 (*Peshut v. 3M Company*)  
17-cv-01413 (*Jordan v. 3M Co., et al.*)  
17-cv-01460 (*Surlow v. 3M Co., et al.*)  
17-cv-01481 (*Lillard v. 3M Co., et al.*)  
17-cv-01522 (*McDaniel v. 3M Company*)  
17-cv-01524 (*Hunter v. 3M Co., et al.*)  
17-cv-01537 (*Leineke v. 3M Company*)  
17-cv-01538 (*Logan v. 3M Company*)  
17-cv-01553 (*Kirkland v. 3M Company*)  
17-cv-01562 (*McGilton v. 3M Company*)  
17-cv-01567 (*Manley v. 3M Company*)  
17-cv-01666 (*Moten v. 3M Company*)  
17-cv-01683 (*Voytko v. 3M Co., et al.*)  
17-cv-01838 (*Hammonds v. 3M Company*)  
17-cv-01961 (*O’Hearn v. 3M Company*)  
17-cv-02157 (*Goss v. 3M Co., et al.*)  
17-cv-02199 (*Pirraglio v. 3M Company*)  
17-cv-02221 (*James v. 3M Company*)  
17-cv-02225 (*Kennedy v. 3M Company*)  
17-cv-02226 (*McGee v. 3M Company*)  
17-cv-02229 (*Karasti v. 3M Company*)  
17-cv-02281 (*Escobedo v. 3M Co., et al.*)  
17-cv-02283 (*Smith, Alberta v. 3M Co., et al.*)  
17-cv-02347 (*Lukens v. 3M Company*)  
17-cv-02426 (*Johnson, V, J. Edwards, et al. v.*  
    *3M Company*)  
17-cv-02450 (*Knapke v. 3M Co., et al.*)  
17-cv-02453 (*Hughes v. 3M Co., et al.*)  
17-cv-02455 (*Nugent v. 3M Co., et al.*)  
17-cv-02538 (*Valentine v. 3M Co., et al.*)  
17-cv-02601 (*Mason v. 3M Company*)  
17-cv-02756 (*Brock v. 3M Co., et al.*)  
17-cv-03259 (*Folmer v. 3M Co., et al.*)  
17-cv-03607 (*Evans v. 3M Co., et al.*)  
17-cv-03997 (*Keith v. 3M Co., et al.*)  
17-cv-04054 (*Miller, Lelea v. 3M Co., et al.*)

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17-cv-04510 (*Gunner v. 3M Co., et al.*)  
 17-cv-04607 (*Collins v. 3M Co., et al.*)  
 17-cv-04814 (*Stevens v. 3M Company*)  
 17-cv-04859 (*Bradford v. 3M Co., et al.*)  
 17-cv-04860 (*Mack, Raymond v. 3M Co., et al.*)  
 17-cv-04967 (*Ewing v. 3M Company*)  
 18-cv-00023 (*Angell v. 3M Co., et al.*)  
 18-cv-00104 (*Blevins v. 3M Co., et al.*)  
 18-cv-00120 (*Upchurch v. 3M Co., et al.*)  
 18-cv-00167 (*Shoaf v. 3M Co., et al.*)  
 18-cv-00347 (*Watson v. 3M Co., et al.*)  
 18-cv-01128 (*Jackson v. 3M Company*)

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Pursuant to Federal Rule of Civil Procedure 11(b) Defendants 3M Company (“3M”) and Arizant Healthcare, Inc. (“Arizant”) (collectively, “Defendants”) respectfully move the Court to enter an order to show cause why the cases identified below should not be dismissed. These plaintiffs’ verified responses in their plaintiff fact sheets (“PFS”) demonstrate that they failed to conduct a reasonable inquiry prior to filing suit, and/or made allegations in their complaints without evidentiary support. As such, these plaintiffs had no basis to sue Defendants, and their cases should never have been filed. *See* Fed. R. Civ. P. 11(b). As discussed below, the cases fall into two categories.

### **GROUP 1 CASES**

Each plaintiff identified in the first table below (“Group 1 Plaintiffs”) denies having any information that the Bair Hugger warming system was used during their infection-related surgeries:

Case Number	Plaintiff	Firm Name
0:15-cv-04044-JNE-DTS	Campbell	The Law Offices of Travis R. Walker, P.A.

0:15-cv-04211-JNE-DTS	Little	Lockridge Grindal Nauen, P.L.L.P.
0:15-cv-04244-JNE-DTS	Seitter	Lockridge Grindal Nauen, P.L.L.P.
0:15-cv-04571-JNE-DTS	Atchetee	Bernstein Liebhard LLP
0:16-cv-00242-JNE-DTS	Dethlefsen, Jr. <sup>1</sup>	Lockridge Grindal Nauen, P.L.L.P.
0:16-cv-00271-JNE-DTS	Charap	The Olinde Firm, LLC
0:16-cv-00360-JNE-DTS	McCormick	The Olinde Firm, LLC
0:16-cv-00384-JNE-DTS	Roth	Michael Hingle & Associates LLC
0:16-cv-00515-JNE-DTS	Klosinski	Goza & Honnold, LLC
0:16-cv-00516-JNE-DTS	Simpson	Goza & Honnold, LLC
0:16-cv-00517-JNE-DTS	Ryan	Goza & Honnold, LLC
0:16-cv-00518-JNE-DTS	Thompson	Goza & Honnold, LLC
0:16-cv-00836-JNE-DTS	Pease	Goza & Honnold, LLC
0:16-cv-00839-JNE-DTS	Smith, Donald	Goza & Honnold, LLC
0:16-cv-00837-JNE-DTS	Burleson	Goza & Honnold, LLC
0:16-cv-00838-JNE-DTS	Plumley	Goza & Honnold, LLC
0:16-cv-00545-JNE-DTS	Andras	Michael Hingle & Associates LLC
0:16-cv-00546-JNE-DTS	Franks, II	Michael Hingle & Associates LLC
0:16-cv-01232-JNE-DTS	Morris	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-01257-JNE-DTS	Harvey	Goza & Honnold, LLC
0:16-cv-01259-JNE-DTS	Lance	Goza & Honnold, LLC
0:16-cv-01858-JNE-DTS	Stitt	The Law Offices of Travis R. Walker, P.A.
0:16-cv-01895-JNE-DTS	Eney	The Miller Firm, LLC
0:16-cv-02000-JNE-DTS	McMillan	Goza & Honnold, LLC
0:16-cv-02005-JNE-DTS	Siddens	The Law Offices of Travis R. Walker, P.A.
0:16-cv-02033-JNE-DTS	Anaya	Brent Coon & Associates

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<sup>1</sup> Based on the PFS served in this matter it appears that Plaintiff was improperly identified as “John Dethelfson, Jr.,” but his name is actually “John Dethlefsen, Jr.” (*Compare* Compl., 16-cv-00242, Dkt. No. 1 *with* Hulse Decl., Ex. 1.)

0:16-cv-02042-JNE-DTS	Asbury	Brent Coon & Associates
0:16-cv-02048-JNE-DTS	Cooke, Jr.	Brent Coon & Associates
0:16-cv-02292-JNE-DTS	Davis	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-02299-JNE-DTS	Redman	Goza & Honnold, LLC
0:16-cv-02338-JNE-DTS	Duval	Bernstein Liebhard LLP
0:16-cv-02500-JNE-DTS	Pastor	Bernstein Liebhard LLP
0:16-cv-02503-JNE-DTS	West	Richardson, Patrick, Westbrook & Brickman, LLC
0:16-cv-02516-JNE-DTS	Wilson	Richardson, Patrick, Westbrook & Brickman, LLC
0:16-cv-02543-JNE-DTS	Mains	Richardson, Patrick, Westbrook & Brickman, LLC
0:16-cv-02546-JNE-DTS	Walker	Bernstein Liebhard LLP
0:16-cv-02584-JNE-DTS	Butler	Bernstein Liebhard LLP
0:16-cv-02591-JNE-DTS	Hebert	Bernstein Liebhard LLP
0:16-cv-02593-JNE-DTS	Marriott	Richardson, Patrick, Westbrook & Brickman, LLC
0:16-cv-02657-JNE-DTS	Waters	Goza & Honnold, LLC
0:16-cv-02658-JNE-DTS	Gobble <sup>2</sup>	Goza & Honnold, LLC
0:16-cv-02729-JNE-DTS	Orias	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-02812-JNE-DTS	Hall	Goza & Honnold, LLC
0:16-cv-02814-JNE-DTS	Grudzinski	Brent Coon & Associates
0:16-cv-02951-JNE-DTS	O'Grady, Jr.	Brent Coon & Associates
0:16-cv-02953-JNE-DTS	Morgan, Jr.	Brent Coon & Associates
0:16-cv-02998-JNE-DTS	Ferrante	Goza & Honnold, LLC
0:16-cv-03109-JNE-DTS	Hrbek	Goza & Honnold, LLC
0:16-cv-03110-JNE-DTS	Dickens	Goza & Honnold, LLC

<sup>2</sup> Based on the PFS served in this matter it appears that Plaintiff was improperly identified as “Charlene Goble” but her name is actually “Charlene Gobble.” (*Compare* Compl., 16-cv-02658, Dkt. No. 1 *with* Hulse Decl., Ex. 2.)

0:16-cv-03165-JNE-DTS	Gallegos	Loncar & Associates
0:16-cv-03317-JNE-DTS	Hollins	Goza & Honnold, LLC
0:16-cv-03357-JNE-DTS	Batkins	The Law Offices of Travis R. Walker, P.A.
0:16-cv-03708-JNE-DTS	Goodson	Goza & Honnold, LLC
0:16-cv-03783-JNE-DTS	White	Goza & Honnold, LLC
0:16-cv-03784-JNE-DTS	Stewart	Goza & Honnold, LLC
0:16-cv-03934-JNE-DTS	Hougen	The Miller Firm, LLC
0:16-cv-03989-JNE-DTS	Malady	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-03993-JNE-DTS	Johnson, Mark	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-04053-JNE-DTS	Hellard	Goza & Honnold, LLC
0:16-cv-04056-JNE-DTS	Rhodes	Goza & Honnold, LLC
0:16-cv-04151-JNE-DTS	Leonard	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-04169-JNE-DTS	McFarland	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-04182-JNE-DTS	Myers, C. Thomas	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-04206-JNE-DTS	Palmer	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-04211-JNE-DTS	Miller, Terri	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-04212-JNE-DTS	Scrittorale	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-04213-JNE-DTS	Fisher	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-04218-JNE-DTS	Polasko	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-04223-JNE-DTS	Mann	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-04283-JNE-DTS	Myers, Frank	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.



0:16-cv-04391-JNE-DTS	Reed	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:16-cv-04410-JNE-DTS	Williams, Gloria	Goza & Honnold, LLC
0:16-cv-04411-JNE-DTS	Thomas	Goza & Honnold, LLC
0:16-cv-04414-JNE-DTS	Munoz	Goza & Honnold, LLC
0:16-cv-04415-JNE-DTS	Smith-Barbour	Goza & Honnold, LLC
0:16-cv-04416-JNE-DTS	Lewis	Goza & Honnold, LLC
0:16-cv-04417-JNE-DTS	Coleman	Goza & Honnold, LLC
0:16-cv-04420-JNE-DTS	Holliday	Goza & Honnold, LLC
0:16-cv-04421-JNE-DTS	Winfield	Goza & Honnold, LLC
0:16-cv-04422-JNE-DTS	McGalliard	Goza & Honnold, LLC
0:17-cv-00052-JNE-DTS	Marshall	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-00225-JNE-DTS	Cooper <sup>3</sup>	Brown and Crouppen, P.C.
0:17-cv-00264-JNE-DTS	Williams, Millard	The Law Offices of Travis R. Walker, P.A.
0:17-cv-00321-JNE-DTS	McDonald	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-00349-JNE-DTS	Baxter	The Miller Firm, LLC
0:17-cv-00434-JNE-DTS	Reid	Goza & Honnold, LLC
0:17-cv-00448-JNE-DTS	Gibson	Richardson, Patrick, Westbrook & Brickman, LLC
0:17-cv-00458-JNE-DTS	Adams	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-00584-JNE-DTS	Lang	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-00588-JNE-DTS	Laguna	The Law Offices of Travis R. Walker, P.A.

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<sup>3</sup> Ms. Cooper's case was transferred from the Eastern District of Missouri (Case No. 4:16-CV-1880) and includes claims from seven other Plaintiffs. (*See* Compl., 17-cv-00225, Dkt. No. 1.) Defendants are only seeking dismissal of Ms. Cooper's claims at this time, and request that her case be severed and dismissed with the other Plaintiffs' cases subject to this Motion. *See* Fed. R. Civ. P. 21.

0:17-cv-00612-JNE-DTS	Christopher	Brown and Crouppen, P.C.
0:17-cv-00712-JNE-DTS	Owens	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-00753-JNE-DTS	Matthews	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-00999-JNE-DTS	Lindsey	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01005-JNE-DTS	Taneff	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01007-JNE-DTS	Litchfield	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01012-JNE-DTS	Hales	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01125-JNE-DTS	Mack, Elizabeth	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01211-JNE-DTS	Carl Torio <sup>4</sup>	Sanders Phillips Grossman, LLC
0:17-cv-01216-JNE-DTS	Hamed	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01217-JNE-DTS	Lane	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01221-JNE-DTS	Locke	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01222-JNE-DTS	Payton	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01242-JNE-DTS	Hightower	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01249-JNE-DTS	Prilo	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01251-JNE-DTS	Whitehead	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01281-JNE-DTS	Hinthorne	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.

<sup>4</sup> Based on the PFS served in this matter it appears that Plaintiff was improperly identified as “Carl Charles Torio,” but his name is actually “Charles Carl Torio.” (*Compare* Compl., 17-cv-01211, Dkt. No. 1 *with* Hulse Decl., Ex. 3.)

0:17-cv-01282-JNE-DTS	Hagaman	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01284-JNE-DTS	Hasler	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01291-JNE-DTS	Henson	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01292-JNE-DTS	Luttrell	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01294-JNE-DTS	Arrington	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01306-JNE-DTS	McCumbers	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01317-JNE-DTS	O'Conner	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01329-JNE-DTS	Hutson	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01334-JNE-DTS	Roszak	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01338-JNE-DTS	Padmore	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01341-JNE-DTS	High	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01342-JNE-DTS	Buczko	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01343-JNE-DTS	Sinnett	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01345-JNE-DTS	Pickelsimer	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01346-JNE-DTS	Peshut	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01413-JNE-DTS	Jordan	Sanders Phillips Grossman, LLC
0:17-cv-01460-JNE-DTS	Surlow	Sanders Phillips Grossman, LLC
0:17-cv-01481-JNE-DTS	Lillard	Gustafson Gluek PLLC
0:17-cv-01522-JNE-DTS	McDaniel	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.

0:17-cv-01524-JNE-DTS	Hunter	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01537-JNE-DTS	Leineke	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01538-JNE-DTS	Logan	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01553-JNE-DTS	Kirkland	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01562-JNE-DTS	McGilton	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01567-JNE-DTS	Manley	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01666-JNE-DTS	Moten	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01683-JNE-DTS	Voytko	Sanders Phillips Grossman, LLC
0:17-cv-01838-JNE-DTS	Hammonds	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-01961-JNE-DTS	O'Hearn	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-02199-JNE-DTS	Pirraglio	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-02221-JNE-DTS	James	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-02225-JNE-DTS	Kennedy	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-02226-JNE-DTS	McGee	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-02229-JNE-DTS	Karasti	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-02283-JNE-DTS	Smith, Alberta	Brent Coon & Associates
0:17-cv-02347-JNE-DTS	Lukens	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-02426-JNE-DTS	Johnson, V, J. Edwards	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-02450-JNE-DTS	Knapke	The Miller Firm, LLC

0:17-cv-02453-JNE-DTS	Hughes	The Miller Firm, LLC
0:17-cv-02455-JNE-DTS	Nugent, Jr. <sup>5</sup>	The Miller Firm, LLC
0:17-cv-02538-JNE-DTS	Valentine	Pogust Braslow & Millrood LLC
0:17-cv-02601-JNE-DTS	Mason	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-02756-JNE-DTS	Brock	Shelton Law Group
0:17-cv-03607-JNE-DTS	Evans	Bailey Peavy Bailey Cowman Heckaman, PLLC
0:17-cv-03997-JNE-DTS	Keith	The Miller Firm, LLC
0:17-cv-04054-JNE-DTS	Miller, Lelea	Goza & Honnold, LLC
0:17-cv-04607-JNE-DTS	Collins	Gustafson Gluek PLLC
0:17-cv-04814-JNE-DTS	Stevens	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-04859-JNE-DTS	Bradford	The Miller Firm, LLC
0:17-cv-04860-JNE-DTS	Mack, Raymond	The Miller Firm, LLC
0:17-cv-04967-JNE-DTS	Ewing <sup>6</sup>	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:18-cv-00023-JNE-DTS	Angell	Langdon & Emison, LLC
0:18-cv-00104-JNE-DTS	Blevins	The Miller Firm, LLC
0:18-cv-00120-JNE-DTS	Upchurch	Langdon & Emison, LLC
0:18-cv-00167-JNE-DTS	Shoaf	The Miller Firm, LLC
0:18-cv-00347-JNE-DTS	Watson	The Miller Firm, LLC
0:18-cv-01128-JNE-DTS	Jackson	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.

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<sup>5</sup> The suffix on Plaintiff's surname was not included in the Complaint filed in this matter, but appears in the PFS served. (*Compare* Compl., 17-cv-02455, Dkt. No. 1 *with* Hulse Decl., Ex. 4.)

<sup>6</sup> Plaintiff in this matter offered no response to the question concerning information that a Bair Hugger Patient Warming System was used during the surgery. Upon written notice from Defendants, Plaintiff's counsel refused to provide a response. (*See* Hulse Decl., Ex. 5.) Since Plaintiff has not indicated that there is any factual basis for the allegation of Bair Hugger warming system use, dismissal is appropriate in this matter as well.

In completing his or her PFS, each of the Group 1 Plaintiffs responded “No” to the question: “Do you have information that a Bair Hugger Patient Warming System (‘Bair Hugger system’) was used during the surgery connected to the infection at issue?” Group 1 Plaintiffs’ cases remain pending before the Court, despite these affirmative representations that they have no basis to sue Defendants for their alleged injuries.

Group 1 Plaintiffs’ counsel had an obligation to conduct a reasonable inquiry prior to filing these lawsuits. Fed. R. Civ. P. 11(b). As the Eighth Circuit has explained, “To constitute a reasonable inquiry, the prefiling investigation must uncover a factual basis for the plaintiff’s allegations, as well as a legal basis.” *Coonts v. Potts*, 316 F.3d 745, 753 (8th Cir. 2003). The Group 1 Plaintiffs cannot forego this obligation because they are not presently conducting further discovery as part of a bellwether pool. “The need for discovery to complete the factual basis for alleged claims is not an excuse to allege claims with no factual basis.” *M-I Drilling Fluids UK Ltd. v. Dynamic Air Inc.*, No. 14-CV-4857 (JRT/HB), 2017 WL 8947185, at \*12 (D. Minn. Feb. 3, 2017), *report and recommendation adopted*, No. CV 14-4857 (JRT/HB), 2017 WL 1193992 (D. Minn. Mar. 30, 2017). “Rule 11 would have no teeth if a plaintiff were allowed to file first, and take discovery later to support its claims.” *Id.*; *see also Bryant v. Brooklyn Barbeque Corp.*, 130 F.R.D. 665, 670 (W.D. Mo. 1990), *aff’d sub nom. Bryant v. Brooklyn Barbecue Corp.*, 932 F.2d 697 (8th Cir. 1991) (plaintiff’s counsel’s statements that he conducted his factual investigation after filing the complaint were “essentially admissions of violations of Fed. R. Civ. P. 11.”).

In Group 1 Plaintiffs’ cases, a reasonable inquiry would include, at a minimum, determining whether there was any evidence that Defendants’ product was *actually used*

in the surgeries at issue.<sup>7</sup> *See, e.g., Intellectual Ventures II LLC v. Commerce Bancshares, Inc.*, No. 2:13-CV-04160-NKL, 2017 WL 4391776, at \*4 (W.D. Mo. Sept. 29, 2017) (finding that Plaintiff failed to conduct an adequate pre-suit investigation where there was no indication of an attempt to determine, prior to filing suit, whether the devices at issue were actually being used). Plaintiffs' counsel has already acknowledged this foundational requirement in response to concerns previously raised by the Court in this MDL:

**Court:** [C]learly . . . you can't sue somebody and hold them liable for something they had nothing to do with. So if it was an ABC machine that was used, not a Bair Hugger.

**Pls.' Counsel:** Absolutely.

**Court:** 3M is not responsible for that.

**Pls.' Counsel:** Absolutely.

**Court:** And you can't sue them for it and you can't haul them into court and make them go to trial.

**Pls.' Counsel:** Absolutely, Your Honor, Plaintiffs agree.

(Mot. Hr'g Tr., 28:23-29:8, Mar. 12, 2018, Hulse Decl., Ex. 6.)

Though the parties disagree on the level of inquiry that is adequate under Rule 11, the Group 1 Plaintiffs fail to meet even the minimal standard Plaintiffs' counsel recognizes

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<sup>7</sup> Bellwether discovery has also demonstrated that Plaintiffs' sole reliance on ambiguous medical records is highly problematic in these cases. This has been particularly true in cases where medical records are internally inconsistent, generically reference patient warming, or contain only a checked box for the Bair Hugger System. Defendants maintain that a plaintiff's reliance on these vague and incomplete medical records is inadequate, and does not discharge a plaintiff of the duty to conduct a reasonable inquiry to determine whether the Bair Hugger system was used during their surgery. However, the Court does not need to answer that question to decide the instant Motion, which is limited to cases where Plaintiffs themselves deny having any factual basis to allege Bair Hugger use.

as necessary. As Plaintiffs’ counsel previously conceded, “in vetting a case prior to filing for Rule 11 purposes . . . plaintiff or plaintiffs’ attorney” would need some type of “medical record confirmation.” (*Id.* at 5:14-22.) Defendants agree with this Court and Plaintiffs’ counsel that Rule 11 imposes an obligation on Plaintiffs to confirm product use prior to filing suit. Group 1 Plaintiffs’ verified PFS responses reveal that they failed to conduct this inquiry, and their cases never should have been filed. Fed. R. Civ. P. 11(b); *see also Coont*, 316 F.3d at 753. Accordingly, this Court should enter an order to show cause why each of the Group 1 Plaintiffs’ cases should not be dismissed.

## **GROUP 2**

Each plaintiff identified in the second table below (“Group 2 Plaintiffs”) (Group 1 and Group 2 Plaintiffs together, “Plaintiffs”) denies having any injury attributable to the Bair Hugger system:

Case Number	Plaintiff	Firm Name
0:16-cv-02298-JNE-DTS	Dandrea	Levin, Papantonio, Thomas, Mitchell, Rafferty, Proctor P.A.
0:17-cv-02157-JNE-DTS	Goss	Kennedy Hodges, L.L.P.
0:17-cv-02281-JNE-DTS	Escobedo	Kennedy Hodges, L.L.P.
0:17-cv-03259-JNE-DTS	Folmer	Kennedy Hodges, L.L.P.
0:17-cv-04510-JNE-DTS	Gunner	Peterson & Associates, P.C.

In completing his or her PFS, each of the Group 2 Plaintiffs responded “No” to each of the following questions:

- Do you allege that you suffered physical and/or bodily injury related to use of a Bair Hugger system?



- Do you allege that use of a Bair Hugger system worsened or aggravated a previously existing injury or condition? and
- Do you claim damages related to emotional distress or psychological injuries as a result of use of a Bair Hugger system?

Although Group 2 Plaintiffs affirmatively deny any Bair-Hugger-related injuries, their cases remain pending before the Court.

Given Group 2 Plaintiffs' representations in their verified PFS responses, it is unclear why they ever sued the Defendants. When a plaintiff denies injury, a claim should not make it to the pleadings stage. *See generally, O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 504–05 (8th Cir. 2009) (citing a broad consensus of cases rejecting no-injury product liability cases). Under the Federal Rules, Group 2 Plaintiffs' counsel had an obligation to ensure that the factual contentions in their complaints were warranted *prior* to filing these cases. *See* Fed. R. Civ. P. 11(b); *Coont*, 316 F.3d at 753. The Group 2 Plaintiffs' self-affirmed lack of injury should have been identified before their suits were filed, when their counsel was conducting the requisite pre-suit inquiry. *See Bryant*, 130 F.R.D. at 670 (reasonable inquiry includes consulting with the client and probing claims prior filing suit).

Group 2 Plaintiffs each acknowledge a lack of injury attributable to Defendants' products. An order to show cause why each of the Group 2 Plaintiffs' cases should not be dismissed is therefore appropriate, to dispose of these cases which never should have been before the Court.

### **CONCLUSION**

For the foregoing reasons, Defendants respectfully request that the Court enter an order for all Group 1 Plaintiffs and Group 2 Plaintiffs to show cause within ten (10) days,

in writing, why their cases should not be dismissed with prejudice for failure to comply with Rule 11(b).

Dated: July 30, 2018

Respectfully submitted,

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